SUPREME COURT, U. S.

FILED

MAR 9 1967

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1130

LEONARD E. NOREN and HARRY C. PERRY,
Petitioners,

vs.

ROBERT E. McCARTHY, Successor to WALTER E. BECK, as Manager of the United States Land Office at Sacramento, California,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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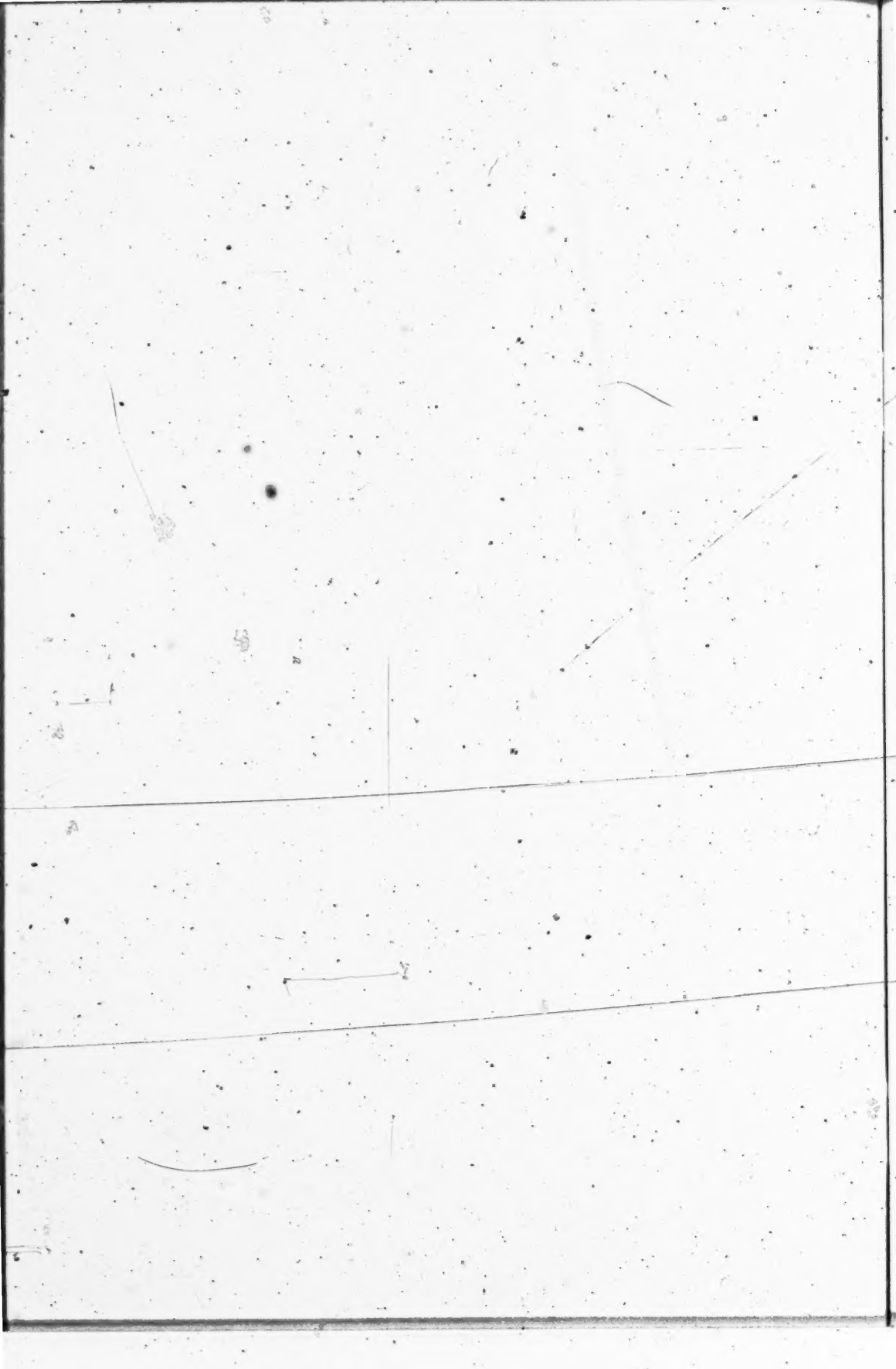

SUBJECT INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
The Reasons for Granting the Writ	5
The Conflict with Other Courts of Appeal	6
Conclusion	7
Appendices	

TABLE OF AUTHORITIES CITED

Cases	Pages
Arnold v. Guimarin Co., 280 F. 238 (1922)	6
Arnold v. Guimarin Co., 263 U.S. 427 (1923)	6
Bass v. Olsen, 327 F2d 662 (1964)	6
Bigart v. Goodyear Rubber Co., 361 F2d 317 (1966)	6
Diaz v. Crom, 195 F2d 517 (1952)	6
Fleming v. Van Der Loo, 160 F2d 905 (1947)	6
Ford Motor Co. v. NLRB, 305 U.S. 364 (1939, 6 Cir.)	5
Hartford A. & I. Co. v. Interstate Equipment Co., 176 F2d 419 (1949)	6
Katzenbuhler v. Talbot, 132 F2d 192 (1942)	6
Kelling Nut Co. v. National Nut Co., 145 F2d 418 (1944)	6
Long v. Union P.R. Co., 206 F2d 829 (1953)	6
Petersen v. Sampsell, 170 F2d 555 (1948)	6
School Dist. #5 v. Lundgren, 259 F2d 101	6
Smith v. Benedict, 279 F2d 211	6
U. S. v. Catlin, 324 U.S. 229	6

Statutes	
28 U.S.C.:	
Sec. 1254(1)	2
Sec. 1291	3
Sec. 1292	3
Sec. 1361	3, 5
Sec. 1391(e)	3, 5
43 U.S.C.:	
Sec. 315 f	5
Sec. 321	5

Constitution	
United States Constitution, Fifth Amendment	3, 5

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LEONARD E. NOREN and HARRY C. PERRY,
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vs.

ROBERT E. McCARTHY, Successor to WALTER E. BECK, as Manager of the United States Land Office at Sacramento, California,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Leonard E. Noren and Harry C. Perry pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on November 8, 1966.

OPINIONS BELOW

The opinions in the Courts below have not been reported. They are:

Judgment and opinion of the Court of Appeals for the Ninth Circuit (which is sought to be reviewed) rendered on November 8, 1966, copy of this judgment and opinion together with the order denying a rehearing are set forth in Appendix A. (R-191-4)

Memorandum and Order of the United States District Court for the Southern District of California, Northern Division, ordering remand of the cause to Respondent and the Administrative Agency, filed July 1, 1965, copy appears as Appendix B. (R-152 et seq.)

JURISDICTION

The judgment of the Court below was entered on November 8, 1966. On December 6, 1966, within the time allowed by rule of Court, a petition for rehearing was filed. On February 8, 1967, the petition for rehearing was denied. On February 13, 1967, an order was made staying issuance of mandate pending the filing, consideration and disposition by this Court of a petition for writ of certiorari providing such petition is filed in the Clerk's office of this Court on or before March 10, 1967. This order also provided that in the event this petition for certiorari is granted, the stay is to continue pending the final disposition of this case by this Court.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether an order remanding a cause to an administrative agency for correction of procedural errors is a final

decision within the meaning of 28 U.S.C. 1291 when that Order of Remand is entered without completely adjudicating other major issues in the cause on their merits.

2. Whether an Appeals Court is authorized to read into a Notice of Appeal from an Order of Remand (entered without complete adjudications in the lower court on the merits) its jurisdiction to consider all other matters before the lower Court in the proceeding.

STATUTES INVOLVED

United States Constitution—Fifth Amendment

28 U.S.C. 1291, 1292—Jurisdiction of Appeals Court

28 U.S.C. 1361—Action to compel an officer of the United States to perform his duty

28 U.S.C. 1391(e)—Venue of District Courts Generally

Their texts are set forth in Appendix E

STATEMENT OF THE CASE

Petitioners made applications under the Desert Land Act which were accepted and filed by the Manager of the United States Land Office at Sacramento, California. The applications were rejected by respondent's predecessor on the claim that the entries sought covered lands which were not suitable for agricultural development even with irrigation. Petitioners were accorded no hearings of any kind but were allowed to file written representations. The administrative remedies of appeal within the Department of the Interior were pursued to finality without success.

Feeling aggrieved, Petitioners filed an action in the Federal District Court at Fresno, California. Their complaint was based on denial of due process, (R-5) erroneous classification of the lands applied for and in a second cause of action in the complaint petitioners charged discrimination

(R-6) in that similar applications for nearby lands of the same type in the identical government-established soil belt in which petitioners sought entries had been allowed by the respondent at about the same time.

The trial of the cause occurred on June 8, 1965 (see Order of Remand, R-155-Appendix C) but was not had on an agreed statement of facts as erroneously alleged in the Appeals Court decision. Evidence was received as shown in the Order of Remand (R-155-6). The trial was not completed as the Court, in accordance with previous advice to the parties, as soon as the evidence showed the denial of due process, suspended the proceeding and remanded the cause to the respondent and the Bureau of Land Management for the purpose of holding further hearings in line with its decision. The Order of Remand to the respondent and the Bureau of Land Management was not a final decision by the District Court as it left untouched and undecided the major issues of the asserted erroneous classification of the lands involved and those included in the entire second cause of action in which discrimination against petitioners in the disposition of their applications was claimed.

The respondent appealed from the Order of Remand (Notice of Appeal, R-162-3, Appendix D). In due course, the Appeals Court for the Ninth Circuit entered the judgment and opinion of which review is sought in this petition. In this opinion in which the Appeals Court directed the District Court to dismiss the complaint in this cause, the Court did not touch on the question of the appealability of the Order of Remand despite the insistence of petitioners. It treated the Notice of Appeal from the Order of Remand as opening up for its review the entire proceeding as it had developed in the District Court. Petitioners filed a petition

for rehearing in the Appeals Court calling attention to the fact that the decision was based entirely on matters outside of its jurisdiction. The petition was denied on February 8, 1967.

The basis for Federal jurisdiction of this cause in the Court of first instance consisted of the Fifth Amendment of the Constitution of the United States, the Act of March 3, 1877, 19 Stat. 377, as amended, 43 U.S.C. sec. 321 (the Desert Land Act), the Act of June 28, 1934, 48 Stat. 1272, as amended, 43 U.S.C. sec. 315 f (the Taylor Grazing Act), and the Act of October 5, 1962, 76 Stat. 744, 28 U.S.C. secs. 1361, 1391 (e).

THE REASONS FOR GRANTING THE WRIT

In disregarding the limitations on its jurisdiction imposed by the Notice of Appeal and the residue of undetermined and undisposed of issues in the District Court, the Court below *impliedly* determined that the Order of Remand was a final decision and in doing so, rendered a decision on a Federal question which conflicts with applicable decisions of this Court.

In *Ford Motor Co. v. NLRB*, 305 U.S. 364, 372 (1939, 6 Cir.) this Court held that a cause involving a review of administrative action could be remanded to the agency for the elimination of procedural errors without relinquishing jurisdiction. Specifically, it was ruled that the reviewing court after ordering a remand to the administrative agency, could, under appropriate circumstances, vacate the order, and proceed with its own review, this Court thereby holding that the original Order of Remand was not a final decision. In this case, it should be noted that the remand came at a time when several material issues remained without adjudication in the lower court.

Substantially the same ruling is to be found in *U. S. v. Catlin,* 324 U.S. 229 as well as in *Arnold v. Guimarin Co.,* 263 U.S. 427. (1923).

THE CONFLICT WITH OTHER COURTS OF APPEAL

The Courts of Appeal in the various Circuits have shown great unanimity in holding that a lower court's action must be final and complete before it becomes appealable. Reference is made to only a few of the applicable decisions.

CIRCUIT

Second: *Bigart v. Goodyear Rubber Co.,* 361 F2d 317 (1966)

Third: *Hartford A. & I. Co. v. Interstate Equipment Co.,* 176 F2d 419 (1949)

Fourth: *Arnold v. Guimarin Co.,* 280 F. 338 (1922)

Fifth: *Diaz v. Crom,* 195 F2d 517 (1952)

Seventh: *Smith v. Benedict,* 279 F2d 211
Katzenbuhler v. Talbot, 132 F2d 192 (1942)

Ninth: *Petersen v. Sampsell,* 170 F2d 555 (1948)
Kelling Nut Co. v. National Nut Co., 145 F2d 418 (1944)
School Dist. #5 v. Lundgren, 259 F2d 101
Bass v. Olsen, 327 F2d 662 (1964)

Tenth: *Long v. Union P.R. Co.,* 206 F2d 829 (1953)

District of Columbia: *Fleming v. Van Der Loo,* 160 F2d 905 (1947)

Apparently, the decision sought to be reviewed by this petition conflicts with decisions in virtually all other Circuits, including its own.

CONCLUSION

It is respectfully submitted that the conflicts between jurisdictions as shown reveal matters meriting consideration by this Court and that this petition for certiorari should be granted.

Dated: March 10, 1967

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Attorney for Petitioners

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 20,671

Robert E. McCarthy, Successor to Walter E. Beck, as Manager of the United States Land Office at Sacramento, California,
Appellant,

vs.

Leonard E. Noren and Harry C. Perry,
Appellees.

[November 8, 1966]

Appeal from the United States District Court for the Southern District of California, Northern Division

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OPINION

Before: DUNIWAY and ELY, Circuit Judges, and POWELL, District Judge

POWELL, District Judge:

This appeal involves the action of the appellant in rejecting the desert land entry applications of the appellees. Two actions were filed by the appellees against the appellant in District Court. The first is Cause No. 2139-ND, which resulted in an order of dismissal entered March 8, 1963; the second action is Cause No. 2347-ND, filed December 6, 1962, while the first action was pending but before the entry of the order of dismissal. Appellant contends that the judgment in the first action, No. 2139-ND, is res judicata and a

bar to the appellees' second action. We agree and reverse with direction to dismiss the second complaint.

The appellees filed separate desert land applications in 1951 and 1952 with the United States Land Office at Sacramento, California. The applications were made on the forms supplied by the Land Office and were accepted and filed upon the payment by the appellees of the twenty-five cent per acre fee as provided by statute. 43 U.S.C.A. 321. The applications are controlled by the Taylor Grazing Act, 43 U.S.C.A. 315 et seq. and the Desert Land Act, 43 U.S.C.A. 321 et seq.

On January 9, 1953, and without any prior notice to the appellees both of the applications were rejected by the predecessor of appellant on the ground that the lands applied for were unsuited for agricultural development. No hearing of any kind was accorded either of the appellees prior to the rejection of their applications.

The appellees appealed the rejections and pursued their administrative remedies without success. The final determination was adverse to them. In December 1960 they filed a complaint in the District Court in Cause No. 2139-ND against the Manager of the United States Land Office at Sacramento, California, where the original applications were filed and against the Regional Administrator, Bureau of Land Management.

In that action in an opinion the trial judge specified that the trial would be on the administrative record. See 199 F. Supp. 708. Thereafter an unpublished opinion was filed holding adversely to appellees and an order was entered dismissing the amended complaint.

That order affirmed the decision of the Secretary of the Interior of September 13, 1960. No appeal was taken from that decision and order. The first complaint in Cause No.

2139-ND sought a temporary restraining order and injunction directing defendants to refrain from any action affecting the status of the lands described, adjudging that the rejection of plaintiffs' applications, and each of them, were arbitrary and capricious, discriminatory and unlawful, and in excess of the statutory powers of the defendants. It asked that the rejection of the applications be set aside and that the applications be reinstated.

While the first action was pending and before the final order of March 8, 1963, to-wit, on December 6, 1962, the second complaint was filed in Cause No. 2347-ND against the same defendants, involving the same applications under the Taylor Grazing Act and the Desert Land Act, and involving the same real property. The second complaint has certain allegations that are identical to those in the first complaint. In the prayer of the complaint the plaintiffs ask the same relief, namely, that the defendants be enjoined from taking any further administrative action respecting the plaintiffs' applications, that they be required to reinstate and allow the applications of the plaintiffs and permit plaintiffs to enter the lands embraced within the applications.

The trial court refused to dismiss the second complaint on appellant's motion that the first action was res judicata.[1] The motion to dismiss was later renewed and again denied.[2] A pre-trial conference order was entered on January 27, 1965, and the case was submitted to the court for determination on an agreed statement of facts.

On July 1, 1965, a memorandum decision was filed holding that the plaintiffs had not been accorded procedural due process in that they had not been permitted to present evi-

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1. Order of April 8, 1963 (R. 29).
2. Order of August 12, 1964 (R. 94).

dence at the time of the rejection of their applications. The order appealed from here remanded the proceeding to the appellant for the purpose of setting aside the rejections of the applications and directing the conduct of further hearings consistent with the findings of the court.[3]

In both complaints the parties and the subject matter are the same. The first complaint stated that the action was brought under the Administrative Procedure Act. The second stated that it arose under the Fifth Amendment to the United States Constitution. The first complaint alleged that the rejection of the applications was arbitrary, capricious, discriminatory and unlawful. The relief asked for in both actions is the same, namely, reversal of the departmental decision. The only new element in the second complaint is the legal theory urged by the appellees that they were not accorded procedural due process under the Fifth Amendment to the United States Constitution.

The appellees could have urged that ground for recovery in the first case or on appeal from the adverse decision. The denial of procedural due process would come within the allegation of arbitrary and capricious action. The assertion of a different legal theory in the second complaint is not the same as the urging of a separate and distinct cause of action. The first decision was res judicata and this case must be reversed.

In *Stark v. Starr*, 94 U.S. 477, 485 (1876), the court stated:

> "It is undoubtedly a settled principle that a party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or proof, or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which a special relief

3. Order of September 17, 1965 (R. 155).

is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible."

To the same effect are the following:

Northern Pacific Railway Company v. Slaght, 205 U.S. 122, 130-132; 27 S. Ct. 442, 445;

Hatchitt v. United States, 158 F. 2d 754, 755 (9 Cir. 1946);

Williamson v. Columbia Gas & Electric Corp., 186 F. 2d 464, 469-470 (3 Cir. 1950);

Annat v. United States, 277 F.2d 554 (5 Cir. 1960);

Myers v. Gardner, 361 F. 2d 343 (9th Cir. 1966).

This case is reversed and remanded to the District Court with direction to dismiss the complaint.

United States Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Wednesday, February 8, 1967

Before: DUNIWAY and ELY, Circuit Judges, and POWELL, District Judge

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellees filed December 6, 1966, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

Appendix B

In the United States District Court
Southern District of California
Northern Division

No. 2347 - ND

Leonard E. Noren and Harry C. Perry,
Plaintiffs,

vs.

Walter E. Beck, as Manager of the United States Land Office at Sacramento, California,
Defendant.

Filed July 1, 1965
R. W. Glover, Deputy Clerk

MEMORANDUM AND ORDER

As this is a Review of an Administrative Proceeding, this court is limited in its review of the matter to the record of the agency's action. 5 U.S.C.A. sec. 1009.

The question to be determined is whether or not the plaintiffs were deprived of due process of law in the rejection of their land application under the Desert Land Act (43 U.S.C.A. sec .321, et. seq.) The plaintiffs contend that they were denied a fair hearing by the Administrative Officer (The Manager of the Land Office in Sacramento). In examining the statutes concerned, there are no limitations or particular methods to be followed in the conduct of the hearing in denying or accepting an application pursuant to the Desert Land Act. The defendant contends that the Desert Land Act does not require a hearing, but in examin-

ing defendant's authority for this, it is without any merit. The defendant relies on 43 C.F.R. 232.9 (b), but this relates only to the filing fee which must accompany the application.

What is a "fair hearing"? The plaintiff cites *Morgan v. United States,* 304 U. S. 1 (1938). This case contains an excellent discussion of what constitutes a "fair hearing" before an administrative agency. The Supreme Court held: ". . . The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them . . ." 304 U. S. at 18. Here, only written evidence of the plaintiffs was used by the Sacramento Land Office in rendering its decision. It would appear that the plaintiffs had little, if any, opportunity to rebut the position of the Manager of the Sacramento Land Office. See *Brotherhood of R. R. Trainmen v. Swan,* 214 F 2d 56 (7th Cir. 1954); *Salvino v. United States,* 119 F. Supp. 277 (W.D., Wash., N.D. 1954).

Furthermore, it is the well accepted rule that procedural due process requires a hearing before the final order is effective. *Dargel v. Barr,* 204 F 2d 697 (7th Cir. 1953). In *Webb v. United States,* 21 F.R.D. 251 (D.C. Pa. 1957) the court brings out another desired requisite of "procedural due process"—i.e., machinery to assure the attendance of witnesses. In the very recent case of *Willner v. Committee on Character,* 373 U.S. 96 (1963), the Supreme Court held that procedural due process requires confrontation of bar applicant by his accusers. The defendant relies on *Cafeteria Workers v. McElroy,* 367 U. S. 886, 894, (1961). But this decision was 5-4, and in light of more recent decisions of the Supreme Court, as indicated above, the *McElroy* decision would appear to have been laid to rest. Although a true analogy cannot be drawn between an administrative proceeding and a criminal case, it is, nevertheless, to be noted

that the Supreme Court on April 5, 1965, held that the Sixth Amendment's guarantee of a defendant's right to be confronted with witnesses against him was binding on the States through the Fourteenth Amendment. *Pointer v. Texas* (No. 577, October Term, 1964).

THEREFORE, in light of the rationale of the above cases as to the necessary criteria of a "fair hearing" and "procedural due process" by an administrative agency, the rejection of this application by the Sacramento Land Office, and its subsequent affirmance by the Bureau of Land Management and the Secretary of the Interior, was capricious and arbitrary. As such, it constituted a denial of due process of law.

The matter should be remanded to the Administrative Agency for further hearings consistent with this opinion.

Dated: July 1, 1965

/s/ M. D. CROCKER

United States District Judge

Appendix C

In the United States District Court
Southern District of California
Northern Division

No. 2347-ND Civil

Leonard E. Noren and Harry C. Perry,
Plaintiffs,

vs.

Walter E. Beck, as Manager of the United States Land Office at Sacramento, California,
Defendant.

Filed September 17, 1965
R. W. Glover, Deputy Clerk

ORDER OF REMAND

This cause came on for trial on June 8, 1965, on the complaint and answer of the parties, and the Court having found that in the proceedings culminating in their rejection of the application of plaintiff Leonard E. Noren for a Desert Land Entry, being No. 045467, Sacramento, California, and in their rejection of the application of plaintiff Harry C. Perry for a Desert Land Entry, being No. 045542, Sacramento, California, the manager of the United States Land Office at Sacramento, California, and the Bureau of Land Management of the United States Department of the Interior acted in a capricious and arbitrary fashion by denying a fair hearing. As such, it constituted a denial of due process of law.

It Is Ordered, that this cause be remanded to the defendant, Robert E. McCarthy, as manager of the United

States Land Office at Sacramento, California, and to the Bureau of Land Management of the United States Department of the Interior for the purpose of setting aside said rejections, and each of them, and conducting further hearings consistent with the findings of this Court.

Dated: September 16, 1965.

/s/ M. D. CROCKER
M. D. Crocker
United States District Judge

Appendix D

In the United States District Court
Southern District of California
Northern Division

No. 2347-ND Civil

Leonard E. Noren and Harry C. Perry,
Plaintiffs,

vs.

Walter E. Beck, as Manager of the United States Land Office at Sacramento, California,
Defendant.

Filed November 15, 1965
R. W. Glover, Deputy Clerk

NOTICE OF APPEAL

Notice Is Hereby Given that the Defendants, Walter E. Beck and Robert E. McCarthy, as manager and former manager, respectively, of the United States Land Office at Sacramento, California, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order of Remand, entered herein September 17, 1965.

In compliance with Local Rule 37 of this Court, the names of all parties to said Order of Remand and the names and addresses of their respective attorneys are set forth below:

Plaintiffs: Leonard E. Noren and Harry C. Perry
Plaintiffs' Attorney: Edson Abel, Esquire,
P.O. Box 396, Middletown, California

Defendants: Walter E. Beck and Robert E. McCarthy, as manager and former manager, respectively, of the United States Land Office at Sacramento, California.

Defendants' Attorneys: Manuel L. Real, United States Attorney, and John J. Schimmenti, Special Assistant to the United States Attorney, Southern District of California, 821 U. S. Courthouse, 312 North Spring Street, Los Angeles, California

Dated: November 15, 1965.

MANUEL L. REAL
United States Attorney
JOHN J. SCHIMMENTI
Special Assistant to the
United States Attorney
By /s/ JOHN J. SCHIMMENTI
Attorneys for Defendants

Appendix E

STATUTES INVOLVED

United States Code

CONSTITUTIONAL AMENDMENT V

Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U. S. C.

Sec. 1291 Final Decisions of District Courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Sec. 1292 Interlocutory Decisions

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges

thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Sec. 1361 Action to compel an officer of the United States to perform his duty.

The district court shall have original jurisdiction of any action in the nature of mandamus to compel an officer or

employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

Sec. 1391 Venue Generally.

* * * *

(e) A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

* * * *

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1130

LEONARD E. NOREN AND HARRY C. PERRY, PETITIONERS

v.

ROBERT E. MCCARTHY, SUCCESSOR TO WALTER E. BECK, AS MANAGER OF THE UNITED STATES LAND OFFICE AT SACRAMENTO, CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court on a preliminary motion in Civil No. 2139–ND is reported at 199 F. Supp. 708. The opinion of the district court in Civil No. 2347–ND (Pet. App. 6–8) is not reported. The opinion of the court of appeals (Pet. App. 1–5) is reported at 370 F. 2d 845.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 1966. A petition for rehearing was denied on February 8, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

282-406—67

QUESTION PRESENTED

Whether the judgment appealed from was a final, appealable decision.

STATEMENT

This is an action to review the decision of the Bureau of Land Management, Department of the Interior, denying petitioners' applications for entry upon certain lands pursuant to the Desert Lands Act (43 U.S.C. 321–339). After exhausting their administrative remedies within the Department of the Interior, the petitioners first brought suit in the Southern District of California (Civil No. 2139–ND) against respondent's predecessor in office. The complaint in that action prayed that the decision rejecting petitioners' applications be set aside as "arbitrary, capricious, discriminatory, unlawful and in excess of the statutory powers" of respondent, that petitioners' applications be reinstated and that petitioners be allowed to enter the lands described in their applications. The district court denied petitioners' request for a trial *de novo* (199 F. Supp. 708). Upon a review of the administrative record, the court found that "the administrative decision and the findings on which it is based are abundantly supported by the evidence appearing in the record"; the court therefore affirmed the administrative decision and dismissed the complaint. No appeal was taken from that judgment.

Prior to the entry of judgment in Civil No. 2139–ND, petitioners instituted a second action against respondent (Civil No. 2347–ND) in which they again prayed that their applications be reinstated and that they be allowed to enter the lands described therein.

Thereafter, the district court denied respondent's motion to dismiss the complaint as *res judicata*. The court then held (Pet. App. 6–8) that the petitioners had been denied due process in the administrative proceedings; it therefore remanded the case to the Department of the Interior "for the purpose of setting aside" the decision rejecting petitioners' applications and "conducting further hearings consistent with the findings of this Court" (Pet. App. 10). Respondent subsequently appealed this latter judgment to the Court of Appeals for the Ninth Circuit. Petitioners moved to dismiss the appeal on the ground that the judgment was not appealable under 28 U.S.C. 1291. That motion was denied by the court of appeals, and subsequently the judgment was reversed as barred by the prior judgment in Civil No. 2139–ND (Pet. App. 1–5).

ARGUMENT

The sole question presented by the petition is whether the judgment of the district court setting aside the decision of the Secretary of the Interior was a "final decision" within the meaning of 28 U.S.C. 1291 and hence appealable. Petitioners do not here challenge the holding that the action in which the appeal was taken was barred as *res judicata*, but only the jurisdiction of the court of appeals.

Petitioners contend (Pet. 5) that the decision was not final because "the remand came at a time when several material issues remained without adjudication in the lower court." But, whether or not the district court had considered all the grounds for relief presented by the complaint, it is not apparent what fur-

ther remedy the court could grant beyond setting aside the administrative decision and remanding for further proceedings. It is not suggested that the district court could itself make the determinations committed by the Desert Lands Act to the discretion of the Secretary of the Interior or his designee. The district court's opinion (Pet. App. 6–8) gives no indication that the court supposed that further relief was to be had, or that jurisdiction was retained for any purpose, or that the decision was other than final. The decision clearly terminated the litigation by setting aside the action complained of. Defects in any subsequent administrative action would of course have given rise to a new cause of action.

Furthermore, petitioners' contention would effectively deny an administrative agency any appellate review of a decision determining the nature of the proceedings it must conduct. Once the Department of the Interior had accorded petitioners the type of hearing required by the district court, that question would be unreviewable as moot. Petitioners thus ignore this Court's repeated holding "that the requirement of finality is to be given a 'practical rather than a technical construction.' *Cohen* v. *Beneficial Industrial Loan Corp.* [337 U.S. 541, 546]." *Gillespie* v. *U.S. Steel Corp.*, 379 U.S. 148, 152.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967

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In the Supreme Court of the United States

OCTOBER TERM, 1966

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LEONARD E. NOREN and HARRY C. PERRY,
Petitioners,

vs.

ROBERT E. McCARTHY, Successor to WALTER E. BECK, as Manager of the United States Land Office at Sacramento, California,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Reply of Petitioners to Respondent's Brief in Opposition

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This reply is submitted solely for the purpose of calling attention to the material error of fact appearing on page 4 of respondent's brief. Referring to the Order of Remand by the District Court, the brief (p. 4, line 11) states: "The decision clearly terminated the litigation by setting aside the action complained of." The record not only fails to support this statement of alleged fact but absolutely refutes it.

Far from "setting aside the action complained of" by petitioners, the District Court remanded the cause to respondent and "to the Bureau of Land Management of the United States Department of the Interior for the purpose of setting aside said rejections (of petitioners' applications), and each of them, and conducting further hearings consistent with the findings of this Court." (R-155-6; Pet. App. 9-10)

In other words, all the corrective steps found by the trial Court to be essential to due process, including the setting aside of previous erroneous action by the respondent, were left to the administrative agency, a procedure recognized as the preferred method of assuring avoidance of encroachment on the administrative field by the judiciary.

The prayer of petitioners' complaint, as filed in the trial Court, was for the setting aside of the rejections of their applications and the allowance of the same. (R-6, 7) The trial Court made no attempt to dispose of any element of this prayer. The finality requisite to bring the District Court's action within the appellate jurisdiction provided by 28 U.S.C.A. 1291 is thus completely lacking.

The procedure followed in this cause was virtually identical with that receiving the approval of this Court in *Ford Motor Co., v. NLRB.,* 305 U.S. 364, 372. While in that case, it is true that the administrative agency requested a remand of the cause, such request had no bearing on the propriety of the procedure. The *Ford Motor Case* was cited recently with tacit approval in *Burlington Truck Lines v. U.S.,* 371 U.S. 156, 172 (1962).

It may be pointed out that this case presents only one simple issue and includes no ancillary issues and no complicating factors such as this Court had before it in the cases of *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, and *Gillespie v. U.S. Steel Corp.,* 379 U.S. 148, cases cited by respondent.

CONCLUSION

It is respectfully submitted that respondent has failed in his effort to infiltrate any semblance of finality into the action of the District Court in this matter and has presented no sufficient grounds for denying the petition herein.

Dated: May 19, 1967

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